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FILED

NO. 689 MAR 4 1998

In The

Supreme Court of the United States

OCTOBER TERM, 1997

BONNIE L. GEISSAL as representative of the Estate of JAMES W. GEISSAL, deceased,

Petitioner,

vs.

MOORE MEDICAL CORP., GROUP BENEFIT PLAN OF MOORE MEDICAL CORP. and HERBERT WALKER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 20, 1997
CERTIORARI GRANTED JANUARY 23, 1998

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The following opinions, orders, memoranda and judgments have been omitted in printing this joint appendix because they appear on the following pages in the printed appendix to the petition for writ of certiorari:

APPENDIX A — LIST OF RELEVANT DOCKET ENTRIES

U.S. DISTRICT COURT
EASTERN DISTRICT OF MISSOURI (EASTERN)
CIVIL DOCKET FOR CASE #: 94-CV-1263

Docket as of May 8, 1996:

Date	Proceedings
6/30/94	COMPLAINT; # Waivers of Service Issued: 4 # Counts: 4 # Consents: 5; jury demand (bll) [Entry date 07/01/94]
6/30/94	RECEIPT # 101596 in the amount of $120.00 for filing fee. (bll) [Entry date 07/01/94]
7/21/94	WAIVER OF SERVICE executed upon defendant Group Benefit Plan on 7/21/94 (cla) [Entry date 08/10/94]
7/28/94	ANSWER by defendant Moore Medical Corp., defendant Group Benefit Plan, defendant Herbert Walker to [1-1] (cla) [Entry date 08/01/94]
8/31/94	ANSWER by defendant Sedgwick Noble Lowndes to [1-1] (ddr) [Entry date 09/09/94]
9/9/94	ORDER by Honorable Mary Ann L. Medler The pltff. has fld. the above cause of action. By random assignment, the matter was referred to the undersigned US Magistrate

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Judge. Pursuant to my memorandum of 9/8/94 to Robert St. Vrain, I have requested that I not be assigned to any case in which the law firm of Sandberg, Phoenix & Von Gontard represents a party because of potential conflict of interest. Therefore the clerk of the court shall randomly reassign this case. (cc: all counsel) (cla) [Entry date 09/16/94]

9/13/94 ORDER fld. by the Clerk Case reassigned to Honorable David D. Noce (cc: all counsel) (cla) [Entry date 09/16/94]

10/4/94 ORDER SETTING RULE 16 SCHEDULING CONFERENCE by Honorable David D. Noce. Scheduling Conference is set for; In-court hearing 11/3/94 at 1:00 p.m. In advance of date for submission of joint proposed scheduling plan, counsel for parties shall meet to discuss nature of parties claims, etc. No later than 11/1/94, counsel shall file with Clerk of Court (and courtesy copy to chambers) a joint proposed scheduling plan (cc: all counsel) (cjw) [Entry date 10/12/94] [Edit date 11/14/94]

11/3/94 ORDER by Honorable David D. Noce; In-court hearing 11/17/94 at 10 AM. Hrg date of 11/3/94 vacated, for response to court; Resp to court ddl 11/15/94 for Sedgwick Noble Lowndes, for Herbert Walker, for

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Group Benefit Plan, for Moore Medical Corp., for James W. Geissal to file joint proposed scheduling plan (cc: all counsel) (jwh) [Entry date 11/08/94] [Edit date 11/14/94]

11/8/94 STIPULATION FOR DISMISSAL OF PARTY-IN-INTEREST defendant Sedgwick Noble Lowndes without prejudice by plaintiff James W. Geissal. SO ORDERED DDN. (cjw) [Entry date 11/15/94]

11/14/94 FULL CONSENT has been received by plaintiff James W. Geissal on 10/6/94, defendant Moore Medical Corp., defendant Group Benefit Plan, defendant Herbert Walker on 11/14/94, defendant Sedgwick Noble Lowndes on 10/11/94 (defendant S.N. Lowndes has been terminated from this case) (seb) [Entry date 11/15/94]

11/14/94 RESPONSE to court JOINT PROPOSED SCHEDULING PLAN by plaintiff James W. Geissal, defendant Moore Medical Corp., defendant Group Benefit Plan, Herbert Walker [9-2] (seb) [Entry date 11/16/94]

11/16/94 ORDER by Honorable David D. Noce granting response [12-1] (cc: all counsel) (jwh) [Entry date 11/21/94]

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1/30/95	MOTION by plaintiff James W. Geissal, defendant Moore Medical Corp., defendant Group Benefit Plan, defendant Herbert Walker, defendant Sedgwick Noble Lowndes to extend discovery deadline to 2/8/95 (jwh) [Entry date 02/02/95]
2/6/95	RULED DOCUMENT by Honorable David D. Noce granting motion to extend discovery deadline to 2/8/95 [14-1] (cc: all counsel) (cjw) [Entry date 02/09/95]
2/16/95	GENERIC SCHEDULING EVENT. terminating resp court ddl of 11/15/94 and in court hrg. of 11/17/94 (cjw)
4/12/95	MOTION by plaintiff James W. Geissal, defendant Moore Medical Corp., defendant Group Benefit Plan, defendant Herbert Walker to amend joint proposed sched plan (jwh) [Entry date 04/14/95]
4/13/95	RULED DOCUMENT by Honorable David D. Noce Parties granted leave to file amended sched plan. (cc: all counsel) (jwh) [Entry date 04/17/95]
4/13/95	AMENDED JOINT PROPOSED SCHEDULING PLAN by plaintiff James W. Geissal, defendant Moore Medical Corp., defendant Group Benefit Plan, defendant Herbert Walker, defendant Sedgwick Noble Lowndes (jwh) [Entry date 04/17/95]

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6/5/95	RULED DOCUMENT by Honorable David D. Noce Pltf granted leave to file memo in support of motion for s/j not to exceed 23 pages. (cc: all counsel) (jwh) [Entry date 06/08/95]
6/5/95	MOTION by plaintiff James W. Geissal for partial summary judgment on issue of obligation of defts to provide Cobra coverage w/memo. (jwh) [Entry date 06/08/95] [Edit date 06/15/95]
6/5/95	AFFIDAVIT of James Geissal re [20-1] (jwh) [Entry date 06/08/95]
6/21/95	MOTION by defendant Moore Medical Corp., defendant Group Benefit Plan, defendant Herbert Walker to stay depos. (jwh) [Entry date 06/22/95]
6/21/95	MOTION by defendant Moore Medical Corp., defendant Group Benefit Plan, defendant Herbert Walker to extend time to respond to pltf's motion for partial sumjgm. (jwh) [Entry date 06/22/95]
6/23/95	RULED DOCUMENT by Honorable David D. Noce granting motion to stay depos. [22-1] (cc: all counsel) (jwh) [Entry date 06/27/95]
6/23/95	RULED DOCUMENT by Honorable David D. Noce granting motion to extend time to

	respond to pltf's motion for partial sumjgm. [23-1] (cc: all counsel) (jwh) [Entry date 06/27/95]
6/30/95	MOTION by defendant Moore Medical Corp., defendant Group Benefit Plan, defendant Herbert Walker to extend time to respond to motion for partial summary judgment to 7/5/95 (jwh) [Entry date 07/06/95]
7/7/95	RULED DOCUMENT by Mag Judge David D. Noce granting motion to extend time to 7/18/95 to respond to motion for partial summary judgment to 7/5/95 [24-1] (cc: all counsel) (cjw) [Entry date 07/11/95]
7/18/95	MOTION by defendants for order for oral argument on pltff's motion for partial summary judgment (lal) [Entry date 07/21/95]
7/18/95	RESPONSE by defendants to motion for partial summary judgment on issue of obligation of defts to provide Cobra coverage w/memo. [20-1] (lal) [Entry date 07/21/95]
7/24/95	ORDER by Mag Judge David D. Noce; the motion of the plaintiffs for summary judgment is set for a hearing on October 20, 1995 at 11:00 a.m.; In-court hearing 10/20/95 (cc: all counsel) (kac) [Entry date 07/25/95]

7/25/95	REPLY by plaintiff James W. Geissal to response to motion for partial summary judgment on issue of obligation of defts to provide Cobra coverage w/memo. [20-1] (jwh) [Entry date 07/26/95]
8/9/95	ORDER by Mag Judge David D. Noce denying motion for order for oral argument on pltff's motion for partial summary judgment [26-1] (cc: all counsel) (jwh) [Entry date 08/15/95]
9/25/95	ORDER by Mag Judge David D. Noce; In-court hearing 10/20/95 at 3:00 on pltf's motion for sum/jgm. Reset from 11:00 (cc: all counsel) (jwh) [Entry date 09/29/95]
11/1/95	MOTION by plaintiff James W. Geissal to substitute party to Bonnie L. Geissal as Personal Representative of the Estate of James W. Geissal, deceased (kac) [Entry date 11/06/95]
11/1/95	RULED DOCUMENT by Mag Judge David D. Noce granting motion to substitute party to Bonnie L. Geissal as Personal Representative of the Estate of James W. Geissal, deceased [32-1]; dismissing plaintiff James W. Geissal and substituting plaintiff Bonnie L. Geissal (cc: all counsel) (kac) [Entry date 11/06/95]

3/19/96	ORDER (with memorandum) by Mag Judge David D. Noce denying motion for partial summary judgment on issue of obligation of defts to provide Cobra coverage w/memo. [20-1]. FURTHER ORDERED that summary judgment is entered for the defts' and against the pltf. on Counts I and II of the amended complaint. Counts I and II are dismissed. FURTHER ORDERED that the parties shall have 45 days in which to file motions for summary judgment on Counts III and IV.; Resp to court ddl 5/3/96 (cc: all counsel) (lgn) [Entry date 03/22/96]
4/4/96	MOTION by plntf Bonnie L. Geissal to enter final judgments on summary judgment rulings on Counts I & II & for determination of no just reason to delay entry of judgment on Counts I & II (kms) [Entry date 04/10/96] [Edit date 04/10/96]
4/4/96	ORDER by Mag Judge David D. Noce granting motion to enter final judgments on summary judgment rulings on Counts I & II for determination of no just reason to delay entry of judgment on Counts I & II [34-1] In the event plaintiff timely appeals from the entry of such judgments, further action on Counts III and IV shall be stayed until disposition of the appeal. (cc: all counsel) (gnb) [Entry date 04/16/96]

4/16/96	JUDGMENT (RSV): for defendant Moore Medical Corp., defendant Herbert Walker, defendant Group Benefit Plan against plaintiff Bonnie L. Geissal on Counts I and II of plaintiff's complaint. (cc: all counsel) (gnb) [Entry date 04/18/96] [Edit date 04/18/96]
5/3/96	NOTICE OF APPEAL filed by plaintiff Bonnie L. Geissal re: the District Court decision; [36-1] fee: $105.00 paid. (gnb) [Entry date 05/07/96]
5/3/96	RECEIPT # S96-012285 in the amount of $105.00 for Notice of Appeal/Dkt Fee, Paid for: Weinhaus & Dobson. (gnb) [Entry date 05/07/96]
5/8/96	DELIVERED TO USCA — 1 Civil Appeal Cover Sheet, 2 Certified Copies of Notice of Appeal, 2 Certified Copies of Clerk's Docket entries and 2 copies of JUDGMENT (DDN) fld. 04/16/96 and SUMMARY JUDG (DDN) fld. 03/19/96. cc: Notice of appeal to Judge Noce. cc: Notice of appeal, clerk's docket entries and USCA letter to parties. (mef)

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Docket as of February 20, 1998:

5/15/96	Civil Case Docketed. Dist. Ct. Office: St. Louis (llb)
5/15/96	CERTIFIED copies notice of appeal, docket entries [96-2285] and judgment of 4/16/96 and 3/19/96 from district court [710134] (llb)
5/15/96	BRIEFING SCHEDULE: [96-2285] Method of Apndx due on 5/28/96; DR aplnt due on 5/28/96; Aplee DR due on 6/4/96; Joint Apndx due on 6/24/96; Aplnt brief due on 6/24/96; Aplee Brief due on 7/24/96; Reply brief due on 8/7/96; (llb)
5/17/96	APPEARANCE for appellant, attorney S. Sheldon Weinhaus [96-2285] [711489] (llb)
5/24/96	DESIGNATION of record received from Appellant Bonnie L. Geisal. Type of appendix: separate [96-2285] (dmh)
6/18/96	RECORDS received: Appendix filed by Appellant Bonnie L. Geisal consisting of 1 Volume(s), 3 Copies. [96-2285] (yml)
6/18/96	BRIEF FILED - Brief of Appellant - Bonnie L. Geisal 47 pgs w/addendum - 10 copies - w/service 6/18/96. [96-2285] [723867] (skh)

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7/18/96	MOTION of Aplee, Moore Medical Corp., for extension of time to file brief until 8/21/96. [96-2285] [735853] w/service 7/17/96 (yml)
7/23/96	ORDER filed: granting in part appellee motion extension of time to file brief [735859] Aplee brief now due on 8/8/96 (yml)
8/8/96	BRIEF FILED - Brief of Appellee - Moore Medical Corp., Group Benefit Plan, Herbert Walker. 15 pgs - w/addendum - 10 copies - w/service 8/8/96. Defects Sum. of Arg. [96-2285] [743059] (yml)
8/16/96	TO SCREENING - to dcm. [96-2285] [746010] (smg)
8/19/96	RETURNED from Screening (15) [96-2285] (smg)
8/19/96	BRIEF FILED - Reply brief - Bonnie L. Geisal. 20 pgs - 10 copies - w/service 8/19/96. [96-2285] [748531] (yml)
10/9/96	*SET FOR ARGUMENT* - DECEMBER in ST. LOUIS. [96-2285] (dgh)
12/11/96	APPEARANCE for appellee, attorney Bradley J. Washburn [96-2285] [789944] (tab)

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12/11/96	ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES George G. Fagg, Circuit Judge, Floyd R. Gibson, Senior Judge, James B. Loken, Circuit Judge. S. Sheldon Weinhaus for Appellant Bonnie L. Geisal. Bradley J. Washburn for Appellees Herbert Walker, Appellees Group Benefit Plan, Appellees Group Benefit Plan Appellees Moore Medical Corp. Rebuttal by: Sheldon Weinhaus. RECORDED. [96-2285] (tab)
5/5/97	RECORDS received: Original File, consisting of 1 Volume(s), Location STL. [96-2285] (stl)
6/10/97	THE COURT: George G. Fagg, Floyd R. Gibson, James B. Loken. OPINION FILED by Floyd R. Gibson PUBLISHED. [96-2285] [862911] (mam)
6/10/97	JUDGMENT: George G. Fagg, Floyd R. Gibson, James B Loken: The judgment of the lower court is AFFIRMED in accordance with the opinion. [96-2285] [862934] (mam)
6/17/97	MOTION of aplnt, Bonnie L. Geisal, for extension of time to file petition for rehearing enbanc until 7/9/97. [96-2285] [866155] w/service 6/17/97 (mam)
6/18/97	ORDER filed: granting appellant motion extend petition for rehearing time [866155-1] [96-2285] [866157] Petition for Rehearing due on 7/9/97 (mam)

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7/9/97	PETITION for REHEARING with suggestions for rehearing en banc. Filed by Appellant Bonnie L. Geisal, w/service 7/9/97 TO COURT. [96-2285] (mjh)
7/30/97	JUDGE ORDER: denying petition for Rehearing with suggestion for rehearing en banc [875536-1] filed by Bonnie L. Geisal. Petition for panel Rehearing is also denied. [96-2285] [883216] (ema)
8/14/97	MANDATE ISSUED [96-2285] (mam)
8/20/97	RECEIPT for Mandate. [96-2285] [891667] (mam)
8/26/97	Record Sent out of the office to lower court at the end of appellate proceedings. Records Included: 1 volume OF; [96-2285] (mam)
10/28/97	U.S. Supreme Court notice regarding petition for writ of Certiorari. Filed in the Supreme Court on 97-689. Supreme Ct. Case No.: 97-689 [96-2285] [916251] (mam)
1/16/98	FEDERAL CITATION: 114 F.3d 1458 [96-2285] (sek)
2/2/98	U.S. Supreme Court order granting Supreme Court notice for certiorari. Brf of petitioner due 3/4/98; Brf of resp due 3/30/98; Reply brf due 4/14/98. [916251-1]. Order filed in the Supreme Court on 1/23/98 Sup. Ct. No. 97-689 [96-2285] (mam)

APPENDIX B — COMPLAINT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION FILED JUNE 30, 1994

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:94CV _____-_____

JAMES W. GEISSAL, individually and in a representative capacity on behalf of the Group Benefit Program of Moore Medical Corp.,

Plaintiff,

v.

MOORE MEDICAL CORP.,

and

GROUP BENEFIT PLAN OF MOORE MEDICAL CORP.,

and

HERBERT WALKER,

Defendants,

and

SEDGWICK NOBLE LOWNDES,

Party in Interest
and Rule 19 (a)
Defendant

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COMPLAINT

- COUNT I -
[COBRA Violations]

NOW COMES plaintiff and for his first cause of action against defendants states:

1. The Court has jurisdiction of this cause pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Comprehensive Omnibus Budget Reconciliation Act of 1986 (COBRA), as from time to time amended, 29 U.S.C. §1001 et seq.

2. MOORE MEDICAL CORP. is a corporation existing under law and engaged in commerce within the meaning of 29 U.S.C. §1002 (11) and is an industry affecting commerce within the meaning of 29 U.S.C. §1002(12), and at all times relevant hereto maintained business offices and operations within the territorial jurisdiction of this Court and this Division.

3. MOORE MEDICAL CORP. as employer established and is the plan sponsor within the meaning of 29 U.S.C. §1102 (5) and (16)(B), of defendant GROUP BENEFIT PLAN OF MOORE MEDICAL CORP. (hereinafter "Plan"), an employee welfare benefit plan as defined in 29 U.S.C. §1002(1).

4. Defendant GROUP BENEFIT PLAN OF MOORE MEDICAL CORP. provides for the payment and reimbursement to plan participants of various medical expenses and is a group health plan as further defined in 29 U.S.C. §1167(1).

5. Defendant MOORE MEDICAL CORP. as employer and plan sponsor is required to provide both notice and offer the

right to plan participants suffering a qualifying event as defined in 29 U.S.C. §1163, the option to continue medical coverage for certain periods of time beyond the period of the said qualifying event, all as more fully set out in the Comprehensive Omnibus Budget Reconciliation Act (COBRA), set out in relevant part at 29 U.S.C. §1161 et seq.

6. At all times relevant hereto defendant HERBERT WALKER was Vice President Human Resources for defendant and further served as both plan administrator and the named plan fiduciary as defined in 29 U.S.C. §1002(16)(A)(1) and (21); and as plan administrator and named plan fiduciary was responsible for administration of the plan and the cessation of benefits thereunder.

7. At all times relevant hereto SEDGWICK NOBLE LOWNDES served as third party administrator of plan and performed various functions of plan administrator as defined in 29 U.S.C. §1002(16)(A)(1), and at times acted for and on behalf of defendants in carrying out various administrative functions related to employer and plan interests.

8. SEDGWICK NOBLE LOWNDES is a party in interest as defined in 29 U.S.C. §1002 (14), and is a necessary party under Rule 19 (a), Federal Rules of Civil Procedure, to assure complete relief can be accorded the plaintiff.

9. At all times relevant hereto, to and including July 16, 1993, plaintiff was employed by defendant MOORE MEDICAL CORP. and a participant in defendant GROUP BENEFIT PLAN OF MOORE MEDICAL CORP., as defined in 29 U.S.C. §1002 (7).

10. Plaintiff at all times relevant hereto suffered from cancer, and he continues to suffer from such cancer and requires a great deal of continuing treatment and medical services.

11. While so employed by defendant MOORE MEDICAL CORP., plaintiff's spouse was employed by a company a stranger to the defendants and the other parties to this complaint, whereby by reason of his spouse's employment, plaintiff was also eligible as for coverage by his spouse's plan as secondary payer, and that such coverage long preceded plaintiff's termination by said defendant MOORE MEDICAL CORP.

12. At all times relevant hereto prior to plaintiff's termination of employment by defendant MOORE MEDICAL CORP. as alleged in paragraph 13 below, and for some limited time thereafter prior to the conduct of defendants alleged in paragraph 14 below, spouse's plan was secondary to coverage by defendant plan for plaintiff, and spouse's plan picked up and provided coverage when limits in GROUP BENEFIT PLAN OF MOORE MEDICAL CORP. were exceeded.

13. On or about July 16, 1993, plaintiff suffered a termination of his employment by MOORE MEDICAL CORP., which action constituted a qualifying event as defined in 29 U.S.C. §1163, entitling him to notice and the right to exercise an option to continue group health plan coverage, as set out in 29 U.S.C. §§1166, 1161 and 1162.

14. On or about January 27, 1994 defendants unilaterally renounced any obligation to provide continuing health benefits coverage and carry out the obligations imposed upon them under the foregoing statutes and their respective obligations

under the plan, and declared any action theretofore taken by all or any one of them under 29 U.S.C. §§1161, 1163 and 1166 to be null and void and of no force, meaning or effect *ab initio.*

15. On information and belief, in so acting as described in paragraph 14 above, defendants did not determine or seek to determine whether the benefits for health care provided prior to plaintiff's termination were equal to or greater than the benefits provided if GROUP BENEFIT PLAN OF MOORE MEDICAL CORP. coverage was to be discontinued, and the failure to provide plaintiff opportunity for COBRA continuation coverage was intentional, willful and in bad faith, with knowledge existing and/or imputed that plaintiff might be deprived needed medical treatment for an existing serious medical condition or suffer a serious diminution of assets needed for survival, and/or that plaintiff would suffer unnecessary harassment by health service providers seeking payments which plaintiff would find difficult to pay.

16. By reason of defendants' conduct amounting to in effect a refusal to provide plaintiff with information to which plaintiff as plan participant is entitled, plaintiff seeks in addition to any compensatory and equitable relief to which he may be entitled, an award in the maximum daily amount allowed by 29 U.S.C. §1132 (c).

17. The conduct alleged hereinabove of failure to provide COBRA benefits and of failure to provide proper notice, constitute a failure to administer the plan in accordance with ERISA and the terms of the plan, thereby rendering defendants liable for failure to discharge their duties with respect to the plan solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to participants

and beneficiaries, in accordance with 29 U.S.C. §1104, for which plaintiff seeks relief on behalf of the plan and in the interest of the plan and its participants and beneficiaries.

18. The participation in such conduct by the defendants and party in interest, warrants the removal of all plan fiduciaries and administrators, and for the Court to appoint independent fiduciaries and administrators to hereafter administer the plan, and prepare proper notices and documents, all at the cost and expense of MOORE MEDICAL CORP.

WHEREFORE, plaintiff prays for compensatory damages and for prejudgment interest on past due benefits, for such further injunctive and equitable relief as may be appropriate in the circumstances, for penalties allowable under 29 U.S.C. §1132 (c), for his costs and expenses including a reasonable attorney's fee, for punitive damages if found to be appropriate, and for such other and further relief as may be meet and just in the premises.

- COUNT II -
[Estoppel]

NOW COMES plaintiff and for his second and alternative cause of action against defendants states:

19. Plaintiff adopts, readopts and incorporates herein by reference paragraph 1 hereinabove, and further states that in the alternative this Court has jurisdiction of this second cause under the federal common law of estoppel and/or has supplemental jurisdiction under 28 U.S.C. §1367.

20. Plaintiff adopts, readopts and incorporates herein by reference paragraphs 2 through 10 and 13 and 14 above.

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21. At the time of the termination of plaintiff's employment as alleged in paragraph 13 above, defendants made representations that misled plaintiff to believe that he was entitled to COBRA continuation under law and that the terms of the GROUP BENEFIT PLAN OF MOORE MEDICAL CORP. called for him to be offered COBRA continuation.

22. Plaintiff relied on the representations made to him as alleged in paragraph 21, to his detriment, and in reliance on such representations thereafter, among other things, continued to pay the amount required for COBRA continuation until the conduct alleged in paragraph 14 occurred, and from and after the termination alleged in paragraph 13 until the occurrence alleged in paragraph 14 occurred, defendants encouraged and continued to encourage plaintiff to make and continue such COBRA continuation premiums.

WHEREFORE, plaintiff prays for compensatory damages and for prejudgment interest on past due benefits, for such further and equitable relief as may be appropriate in the circumstances, for his costs and expenses including a reasonable attorney's fee, for punitive damages if found to be appropriate, and for such other and further relief as may be meet and just in the premises.

- COUNT III -
[Waiver]

NOW COMES plaintiff and for his third and alternative cause of action against defendants states:

23. Plaintiff adopts, readopts and incorporates herein by reference paragraph 1 hereinabove.

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24. Plaintiff adopts, readopts and incorporates herein by reference paragraphs 2 through 10 and 13 and 14 above.

25. At the time of the termination of plaintiff's employment as alleged in paragraph 13 above, defendants made representations to the effect that the plan permitted and called for plaintiff to be offered continuation beyond the termination of employment, that led plaintiff to believe that he was entitled to COBRA continuation.

26. Plaintiff relied on the representations made to him as alleged in paragraph 25, and made payments for such continuation from and after the termination alleged in paragraph 13, which continuation payments defendants accepted until the conduct alleged in paragraph 14 occurred.

27. By the conduct alleged hereinabove in paragraphs 25 and 26, defendants waived any differing construction or interpretation of plan provisions.

WHEREFORE, plaintiff prays for compensatory damages and for prejudgment interest on past due benefits, for such further and equitable relief as may be appropriate in the circumstances, for his costs and expenses including a reasonable attorney's fee, for punitive damages if found to be appropriate, and for such other and further relief as may be meet and just in the premises.

- COUNT IV -
[§104(b)(4) violation]

NOW COMES plaintiff and for his fourth and separate cause of action against defendant HERBERT WALKER as plan administrator, states:

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28. Plaintiff adopts, readopts and incorporates herein by reference paragraphs 1 through 10 and 13 and 14 above.

29. On or about May 27, 1994 plaintiff through his duly authorized agent made written demand on defendant Herbert Walker as the named plan administrator, pursuant to 29 U.S.C. §1024 (b)(4), for a complete and full copy of the entire plan documents, and advised of the obligation therefor and of the possible assessment of penalties under 29 U.S.C. §1132(c)(1) if the same not be provided within 30 days thereof.

30. The May 27, 1994 demand stated

> "In any event, as representative of Mr. Geissal and on his behalf, I hereby request of you as the named plan administrator, a copy of the health benefit plan and all relevant amendments thereto. Please understand that the law permits penalties if a copy is not sent within 30 days of this request. Those responsible may guide themselves accordingly."

31. On or about June 2, 1994 defendant sent in response only a document noted to be only a summary plan description and which document advised that it was only a summary and not the entire plan document and "does not contain all the plan details," and purported that there was a separate plan document containing "all the terms, provisions and conditions of the plan document."

32. The documentation provided on or about June 2, 1994 by defendant as purported full compliance with the May 27 request was without charge. Defendant thereby waived any right to claim charges in response to plaintiff's May 27, 1994 request.

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33. On or about June 7, 1994 plaintiff through his authorized agent, advised defendant's agent that the document production was incomplete and did not fully meet the terms of the original request.

34. The June 7, 1994 letter stated

> "Finally, and of most importance, please note that the last paragraph of my May 27 letter did not ask alone for the SPD. I asked for the plan itself and all amendments thereto. Conceivably the SPD may be the only plan document, but if that is the case I would like someone responsible to so state. The document I received at the same time I received your June 2 letter, has as a footer on each page "SPD." Ordinarily, because of various ERISA requirements, the plan and the SPD are not the same. In fact the page numbered 3 in the booklet sent, expressly notes the document is not the plan. Perhaps you intended more to be sent by your reference to have a "plan booklet" sent to me, but your client did not so understand. Please look into this. I do not want to have to sue for something which I anticipate is easy to immediately remedy."

35. On June 28, 1994 defendants acknowledged for the first time that they were aware that on June 2, 1994 they did not send all plan documentation that had been requested, offered no excuse for the attempted deception, and for other documents not clearly identified but recognized to be within the plaintiff's request, defendants demanded the payment of $50 without showing whether or how that monetary demand comported with the Secretary's regulations of reasonableness.

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36. The time allowed in 29 U.S.C. §132(c)(1) for production has now expired, and to the time of the filing of this lawsuit defendant has failed and refused to make production of any plan document other than the document purporting itself to be only a summary plan description and other than offering on June 28, 1994 other documents at a cost not clearly tied into that which the Secretary allows and contrary to the waiver alleged above.

WHEREFORE, plaintiff prays for an order compelling defendant to make production of all plan documents and if appropriate, assessment of penalties at the maximum rate allowed by statute, until such time as production is made, for such further and equitable relief as may be appropriate in the circumstances, for his costs and expenses including a reasonable attorney's fee, and for such other and further relief as may be meet and just in the premises.

WEINHAUS AND DOBSON

s/ S. Sheldon Weinhaus
By S. Sheldon Weinhaus MBE#16699
906 Olive Street, #900
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Attorneys for plaintiff

APPENDIX C — MOTION FOR PARTIAL SUMMARY JUDGMENT FILED JUNE 5, 1995

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:94 CV 1263 DDN

JAMES W. GEISSAL, etc.

Plaintiff,

v.

MOORE MEDICAL CORP., et al

Defendants,

MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE MAIN ISSUE OF OBLIGATION OF DEFENDANTS TO PROVIDE COBRA COVERAGE

NOW COMES plaintiff and pursuant to Rule 56, FRCP, moves for entry of partial judgment in plaintiff's favor on the issue of the obligation of defendants or one of them, to provide him with a nonrevocable COBRA election and with health benefits under the health insurance plan after plaintiff timely exercised his election and paid premiums therefore.

As grounds therefore, plaintiff states

1. No contest exists to the fact that plaintiff suffered an event qualifying plaintiff for COBRA continuation coverage under 29 U.S.C. §1163, and

that plaintiff acquired no other insurance following the occurrence of such qualifying event. The interpretation of 29 U.S.C. §1162(2)(D)(i) presents no factual contest, but is a pure issue of law requiring no trial or hearing.

2. To the extent applicable, depending on the Court's view of 29 U.S.C. §1162(2)(D)(i), plaintiff presents by affidavit concurrently filed with this motion, that differences exist as between health insurance coverage provided by defendants and that provided by any preexisting coverage by reason of his spouse's employment at the time of the occurrence of the §1163 qualifying event, and that a person in plaintiff's state of health would not have reason to believe coverage only under the preexisting spousal coverage was adequate at the time of or following the §1163 qualifying event.

3. To the extent applicable, depending on the Court's view of 29 U.S.C. §1162(2)(D)(i), plaintiff presents by affidavit uncontestable fact that defendants initially offered him such continuation COBRA coverage, that he regularly and periodically as required paid premiums therefore, that he detrimentally relied on defendants' assurances of entitlement to such coverage, such that defendants are as a matter of law estopped from later revoking such coverage.

In further support hereof, plaintiff adopts, readopts and incorporates herein by reference his affidavit attached hereto, and asks the Court to further consider the pleadings and his

memorandum in support of this motion concurrently filed herewith.

WHEREFORE plaintiff moves for partial summary judgment.

APPENDIX D — AFFIDAVIT OF JAMES GEISSAL IN SUPPORT OF SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No: 4:94 CV 1263 DDN

JAMES W. GEISSAL, etc.

Plaintiff,

v.

MOORE MEDICAL CORP., et al

Defendants,

PLAINTIFF'S AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON LIABILITY ISSUES

COMES NOW plaintiff, a resident of the State of Missouri and of more than 21 years of age, and having first been duly sworn, states of his own personal knowledge as follows:

1. I am the plaintiff in the above captioned action.

2. My date of birth is May 5, 1931. I am presently 64 years old.

3. I was employed by defendant MOORE MEDICAL CORP. ("Moore") on or about July 10, 1986, when Moore acquired the business with which I had been associated.

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4. During the period of my employment by Moore, I was a participant in a health benefits plan sponsored by Moore for its employees, which included myself. That plan is the defendant GROUP BENEFIT PLAN OF MOORE MEDICAL CORP (Plan). The plan document provides during the time relevant to my lawsuit, that the corporate office then occupied by defendant HERBERT WALKER (Walker) serve as the Plan administrator. The Plan pays for various medical treatments and services for the participants.

5. During the period of my employment by Moore, I relied heavily on Plan for the payment of my medical expenses. I had and have cancer. The Plan had an annual deductible for covered medical services and treatments that I mainly needed, in the amount of $150. It also had a lifetime maximum only as to payments made by the Plan.

6. During the period of my employment by Moore, my spouse worked for Trans World Airlines (TWA), and by reason thereof, she was a covered participant and I was a covered dependent under the health insurance policy issued by Aetna Life Insurance Company (Aetna). Any payments by Aetna would be secondary to that of defendant Plan. The annual deductibles under the Aetna coverage were significantly and substantially larger than the small deductible of defendant Plan. The Aetna deductible was about $500 a year per person. Coverage of some kinds of care were different, with coverage under defendant Plan more extensive. The Aetna policy also had a lifetime maximum only as to payments made by Aetna.

7. Because of my illness, there is always the very real possibility that the expenses for my care could exceed the lifetime maximum of either the Aetna policy or the Plan separately.

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8. I was involuntarily terminated by Moore from my employment with it on July 16, 1993. I was orally told I was being terminated. A letter issued by Moore under compulsion of the Missouri Service Letter statute, uses the word "separated." A note turned over by defendants as part of their production, uses the term "laid-off." Moore's Connecticut counsel later referred to it as "termination." In any event, thereafter I no longer performed any services for Moore.

9. At the time the news media and other sources reported the continued financial distress of TWA and queried how much longer TWA might remain in business.

10. I question the reason given for my termination. In my view, the reason given in the service letter is pretextual. I did not desire to be terminated, and at the time I gave some thought to whether I should consult with an attorney to investigate and to determine what rights and claims I might have against Moore, including claims for a larger amount of termination pay, for unpaid bonus, wrongful discharge, and claims for discrimination under federal and state law. I felt Moore had been very unfair in discharging me. I knew I could complain as well to government agencies. I decided to forbear and not to pursue any of these avenues, because:

a. My main concern when I was terminated was that I have full and adequate health insurance. Although at the time I felt I had strength and fortitude, my cancer had not been cured. I anticipated much expensive medical care and treatment could possibly become necessary. Absent substantial insurance I anticipated that my and my wife's finances could even be exhausted and my wife

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left without adequate resources after my death. Should I be cured, I recognized that without adequate insurance the expenses of cure could be such that I would have no savings to draw upon. I wanted to avoid these catastrophic concerns.

b. Defendant Walker or his subordinates emphasized that I could notwithstanding the termination, still have Plan benefits available to me under COBRA. I was given an election form to continue coverage under COBRA. Walker or his subordinates stressed that I take care of the COBRA continuation option I was offered and encouraged me to make the COBRA election Moore offered to me. I was encouraged to timely make premium payments for COBRA. This conduct did much to assuage my feelings about my discharge and entitlements, sufficient that I decided to forebear taking any protective or even investigative steps beyond requesting a service letter.

c. At about the same time, and shortly after the issuance of the service letter, the Plan and/or its reinsurer were engaged in making some large medical payments for me. I found out since that time that these payments were for my prior care and not for care that I needed following my termination.

11. Apart from what actions I may have taken directly against Moore, from which I forbore, I also felt that because of the COBRA offered, I would not look for yet another insurance carrier for either primary or secondary coverage. Had I known I would be limited to only coverage through my

wife's insurer, especially considering the published threatened financial viability of that employer (TWA), I would have at the time of my termination looked for additional coverage then when I had the strength and fortitude to look and considered myself to be in much better shape than I was in at the time defendants later revoked by COBRA coverage.

12. In essence, the defendants' offer to me of COBRA continuation, and their taking of premium payments from me as described below, lulled me into several acts of forbearance.

13. As a result of documents obtained from defendants in discovery, sometime before January 20, 1994 defendants determined that they would assert I was not entitled to COBRA continuation, and started taking steps to prevent payment of benefits under my COBRA coverage. I think it may have been because of the large bills they were suddenly getting again after I had been terminated.

14. Upon my termination by Moore I received a notice of my right under COBRA to continue health insurance coverage under Plan. I exercised said continuation option, and each and every month I timely paid to defendants my monthly premium.

15. Some six months and 10 days after the termination of my employment from Moore, I was given notice by a letter dated January 27, 1994 from defendant Herbert Walker (Walker), that defendants had determined I was not entitled to COBRA coverage "since you were already covered under a group policy with Aetna," which was the health provider or third party administrator (TPA) under the TWA health benefits plan provided by TWA for its employees. I was told the months of premiums I had already paid for this continuation coverage,

would be returned and that those who had provided me with medical care during this period would not be paid by Plan and their billings would be returned to those that provided care to me. At no time earlier was I told by any of the defendants that defendants or that their own TPA were not timely paying the bills of my health care and services providers.

16. By the time of receipt of this January 27, 1994 notice from defendants, I was already far more affected by the cancer, and appreciably lacking the strength and fortitude I had when terminated. I have since learned some time limits on any claims I might have had, were only six months in length from the date of my termination, and thus had recently expired. I certainly did not have any six months to start an investigation or take action. I was foreclosed.

17. Sometime after this January 27, 1994 notice I retained Sheldon Weinhaus to represent me on the claims asserted in this lawsuit. He had and was given my full authority to ask for documents and information relating to the Plan.

Further affiant saith not.

s/ James W. Geissal
JAMES W. GEISSAL

APPENDIX E — SUBSTITUTION OF PARTY PLAINTIFF FILED NOVEMBER 1, 1995

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:94 CV 1263 DNN

JAMES W. GEISSAL, etc.

Plaintiff,

v.

MOORE MEDICAL CORP., et al

Defendants,

SUBSTITUTION OF PARTY PLAINTIFF

Upon the suggestion of the death of the plaintiff JAMES W. GEISSAL, and the Court being advised that Letters Testamentary have been issued to BONNIE L. GEISSEL by the Probate Division of the Circuit Court of the County of St. Louis, Missouri, in the Estate of James W. Geissal, estate 120010, on oral application of said Personal Representative the Court hereby substitutes BONNIE L. GEISSEL as Personal Representative of the Estate of James W. Geissal, deceased. The Clerk shall change the caption of the cause accordingly to reflect such substitution.

WEINHAUS AND DOBSON

s/ S. Sheldon Weinhaus MBE #16699
906 Olive Street, #900
St Louis, Mo 63101
314/621-8363
Attorneys for plaintiff

SO ORDERED

s/ David D. Noce
U.S. Mag. Judge
Date: 11-1-95

APPENDIX F — ORDER AND MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION FILED MARCH 19, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

BONNIE E. GEISSAL,[1]

Plaintiff,

v.

MOORE MEDICAL CORP., et al.,

Defendants.

No. 4:94 CV 1263 DDN

ORDER

In accordance with the Memorandum filed herewith,

IT IS HEREBY ORDERED that plaintiff's motion for partial summary judgment (Doe. No. 20) is denied.

IT IS FURTHER ORDERED that summary judgment is entered for the defendants and against the plaintiff on Counts I and II of the amended complaint. Counts I and II are dismissed.

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1. Upon the death of plaintiff James W. Geissal, Bonnie L. Geissal, personal representative of the estate of James W. Geissal, was substituted as party plaintiff Fed. R. Civ. 25(a).

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IT IS FURTHER ORDERED that the parties shall have forty-five days in which to file motions for summary judgment on Counts III and IV.

s/ David D. Noce
UNITED STATES MAGISTRATE JUDGE

Signed this 19th day of March, 1996.

Appendix F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

BONNIE L GEISSAL,[1]

Plaintiff,

v.

MOORE MEDICAL CORP., et al.,

Defendants.

No. 4:94 CV 1263 DDN

MEMORANDUM

This matter is before the Court upon the plaintiff's motion for partial summary judgment (Doe. No. 20) The parties have consented to the jurisdiction to the United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).

This case involves the continuation coverage provisions of the Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Comprehensive Omnibus Budget Reconciliation Act of 1986 (COBRA), 29 U.S.C. § 1001 *et seq*. Plaintiff is Bonnie L. Geissal, wife and personal

1. Upon the death of plaintiff James W Geissal, Bonnie L. Geissal, personal representative of the estate of James W. Geissal, was substituted on November l, 1995, as party plaintiff. Fed. R. Civ. P. 25(a). References to plaintiff in the masculine in this Memorandum are to decedent.

representative of the estate of James W. Geissal, who is now deceased. Defendants are Moore Medical Corporation, Group Benefit Plan of Moore Medical Group and Herbert Walker. On plaintiff's motion, Sedgwick Nobel Lowndes, originally named as a defendant, was dismissed without prejudice by order of the Court on November 8, 1994.

Count I alleges that defendants violated COBRA by failing to provide continuation insurance coverage once Moore terminated Geissal's employment. Count II alleges that defendants are estopped from denying coverage because at the time of Geissal's termination, defendants made misrepresentations that made him believe that he was entitled to COBRA continuation and would have insurance coverage. Plaintiff alleges that Geissal relied on these representations and continued to pay the amount required for COBRA continuation. Count III alleges waiver, in that, by accepting Geissal's payments, defendants waived any differing construction or interpretation of ERISA plan documents. Count IV, which is not the subject of the pending motion, alleges that Herbert Walker, as plan administrator, failed to provide requested plan documents as required by statute.

Plaintiff has moved for partial summary judgment on the issue of defendants' obligation to provide COBRA coverage.

The following facts are without dispute:

FACTS

1. On July 16, 1993, Moore Medical Corp. (Moore or Moore Medical) terminated James Geissal. (Geissal Affidavit, filed June 5, 1995, at ¶ 8; Defendants' Answer, filed July 28, 1994.) At

the time of his termination, Geissal was 62 years old and had cancer. (Geissal Aff. at ¶¶ 2, 5.) During his employment at Moore, Geissal was a participant in a health benefits plan, the Group Benefit Plan of Moore Medical Corp., sponsored by Moore for its employees. (Geissal Aff. at ¶ 4; Complaint at ¶ 9; Answer at ¶ 9.)

2. Moore Medical Corp. is an employer and the plan sponsor, within the meaning of 29 U.S.C. § 1102(5) and (16)(B), of defendant Group Benefit Plan (Plan) of Moore Medical Corp. The plan is an employee welfare benefit plan as defined in 29 U.S.C. § 1002(1). Defendant Group Benefit Plan of Moore Medical Corp. provides for the payment and reimbursement to plan participants of various medical expenses and is a group health plan as defined in U.S.C. § 1167(1). (Complaint at ¶¶ 3, 4; Answer at ¶¶ 3, 4.)

3. While Geissal was employed at Moore, his wife, Bonnie, was employed by Trans World Airlines (TWA). (Complaint at ¶ 11; Answer at ¶ 11; Geissal Aff at ¶ 6.) By reason of Bonnie Geissal's employment at TWA, James Giessal was a covered dependent eligible for coverage under the health insurance policy issued by Aetna Life Insurance Company, which was the health provider or third-party administrator under the TWA plan provided by TWA for its employees. (Geissal Aff. at ¶ 6, 15.) Geissal's coverage through his wife's plan preceded Geissal's termination by Moore. (Complaint at ¶ 11.)

4. Upon Geissal's termination at Moore Medical, Geissal received a notice of his right under COBRA to continue health insurance coverage under Moore's benefit plan. He accepted Moore's offer and elected to continue receiving group health coverage under Moore's Plan. He began making premium

payments. (Geissal Aff. at ¶ 14.) The defendant accepted the payments. Approximately six months after his termination, by letter dated January 27, 1994, defendants informed Geissal that they had determined he was not entitled to COBRA coverage because he was already covered under a group policy with Aetna. (Geissal Aff. at ¶ 15.) Geissal was told that the premiums he had already paid would be returned and that those who provided him with medical care during that period would not be paid by the Plan and their billings would be returned to those who had provided medical care to him. (Geissal Aff. at ¶ 15.)

5. Moore's plan had an annual deductible of $150. It also provided for a lifetime maximum amount of benefits. (Geissal Aff. at ¶ 5.) TWA's plan through Aetna had an annual deductible of $500 per year per person and also provided a lifetime maximum amount of benefits. (Geissal Aff. at ¶ 6.)

6. At the time Geissal was terminated, he requested and received a service letter pursuant to Missouri Rev. Stat. § 290.140. (Geissal Aff. at ¶¶ 8, 10b.) At the time he was terminated, he considered whether he should consult an attorney to investigate what rights and claims he might have against Moore because he felt he was unfairly terminated. (Geissal Aff. at ¶ 10.) Geissal decided not to do so, because his main concern was that he have full and adequate health insurance. (Geissal Aff. at ¶ 10a.) Moore representatives encouraged him to make the COBRA election, which did much to assuage his feelings about his discharge. (Geissal Aff. at ¶ 10 b.) At about this time, and shortly after the issuance of the service letter, the Plan or its reinsurer were making large payments for medical care provided to Geissal prior to his termination. (Geissal Aff. at ¶ 10c.) Because he was offered the COBRA continuation coverage, Geissal did not look for another insurance carrier. (Geissal Aff. at ¶ 11.)

DISCUSSION

Plaintiff has moved for partial summary judgment on the issue of defendants' obligation to provide COBRA coverage. Plaintiff states that Counts I, II and III are related to that issue. However, plaintiff has not argued the issue of waiver, which is the basis for Count III. Plaintiff states that a finding of liability on Count I would moot Counts II and III

This Court must grant summary judgment if, based upon the pleadings, admissions, depositions and affidavits, there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corporation v. Catrett*, 477 U.S. 317, 322 (1986); *Board of Education, Island Trees Union Free School Dist. v. Pico*, 457 U.S. 853, 863 (1982). The moving party must initially demonstrate the absence of an issue for trial. *Celotex Corporation*, 477 U.S. at 323. Any doubt as to the existence of a material fact must be resolved in favor of the party opposing the motion *Board of Education v. Pico*, 457 U.S. at 863.

Nevertheless, once a motion is properly made and supported, the non-moving party may not rest upon the allegations in his pleadings but must instead set forth specific facts showing that there is a genuine issue of material fact for trial. Fed. R Civ. P. 56(e); *Buford v. Tremayne*, 747 F.2d 445, 447 (8th Cir. 1984). Summary judgment must be granted to the movant if, after adequate time for discovery, the non-moving party fails to produce any proof to establish an element essential to the party's case and upon which the party will bear the burden of proof at trial. *Celotex Corporation*, 477 U.S. at 322-24.

In response to the motion, defendants have raised several issues. First, defendants argue that the plaintiff lacks standing

to maintain the instant lawsuit because plaintiff has no economic damages. Based upon the discovery supplied by plaintiff and Aetna, which was the group insurance carrier under the spouse's preexisting health benefit plan, defendants assert that all of plaintiff's medical bills for "covered expenses" during the relevant period were paid by Aetna. Therefore, defendants claim, plaintiff has no claim for compensatory damages or other type of damages because he has suffered no damages. The Court nevertheless concludes that plaintiff has standing to bring this lawsuit for relief other than compensatory damages. *See* 29 U.S.C. § 1132(a) (1).

Second, defendants argue that a necessary party needed for complete adjudication pursuant to Federal Rule of Civil Procedure 19(a) is not before the Court. Defendants argue that the real party in interest is Aetna, the health provider for the TWA plan, and TWA, Bonnie Geissal's employer. Defendants argue that the question is whether Moore or Aetna should pay for the covered medical expenses during the COBRA-continuation period. Defendants argue that if the Court were to hold that Moore should have provided COBRA coverage to Geissal and that such policy was primary to Aetna's policy, then Aetna should be reimbursed by Moore for all "covered expenses" incurred by Geissal during the COBRA period. Further, the plaintiff would owe the Moore health plan $2,673.18 for 18 months of COBRA coverage. They argue that there is a possibility of a double recovery for plaintiff.

Plaintiff, in response, argues that defendants have waived the defense of failure to join a necessary party. However, because this defense can be raised as an issue at a trial on the merits, *see* Federal Rule of Civil Procedure 12(h)(2), the question of whether there is a genuine issue for trial with regard to this

defense can appropriately be raised on a motion for summary judgment. *See Kornblum v. St. Louis County*, 48 F.3d 1031, 1038 (8th Cir.), *opinion vacated on other grounds*, 72 F.3d 661 (8th Cir. 1995).

The question of whether a party must be joined is examined under Federal Rule of Civil Procedure 19 (a), which states in pertinent part:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the persons absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk on incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Aetna is not a necessary party under the first subsection of Rule 19 (a), because complete relief may be granted between Moore and plaintiff without Aetna's joinder. Moore may be required to continue coverage, in consideration for premiums paid. Because Aetna has already paid claims, its joinder is not necessary in order for plaintiff to obtain relief from Moore.

Therefore, defendants must rely on Rule 19 (a)(2), which requires a finding that Aetna "claims an interest relating to the

subject matter of the action." Assuming that Aetna "claims" such an interest, the remaining requirements of Rule 19(a)(2) are not met. Aetna's absence from this case will not impair or impede its ability to protect that interest. If the Court decides that Moore should have provided COBRA coverage, Aetna could decide what future recourse, if any, to take. The possibility of potential litigation is irrelevant to the criteria of Rule 19. "The focus is on relief between the parties and not on the speculative possibility of further litigation between a party and an absent person." *LLC Corp. v. Pension Benefit Guaranty Corp.*, 703 F.2d 301, 305 (8th Cir. 1983). In addition, a determination of the case in the absence of Aetna will not subject Moore to the risk of inconsistent or double obligations.

Third, defendants argue that the Court cannot grant relief against them unless it finds that the Moore health plan was primary to the Aetna health plan. This determination can be made upon adequate discovery, without Aetna's presence as a party.

The cardinal issue between the present parties is whether James Geissal's preexisting (Aetna) insurance coverage made him ineligible for continuation coverage with the Fund upon his termination. The resolution of that issue is one of statutory interpretation. ERISA, as amended by the Consolidated Omnibus Budget Reconciliation Act (COBRA), 29 U.S.C. § 1161-1168, requires employers to offer continuation coverage to certain categories of departing employees. COBRA specifies the circumstances which entitle an employer to terminate continuation coverage. The termination provision at issue in this case is as follows:

> The coverage must extend for at least the period beginning on the date of the qualifying event and ending not earlier than the earliest of the following:

* * *

> (D) The date on which the qualified beneficiary first becomes, after the date of the election —
>
> (i) covered under any other group health plan (as an employee or otherwise) 'which does not contain any exclusion or limitation with respect to any preexisting condition of such beneficiary.'

29 U.S.C. § 1162(2)(D)(i).

Plaintiff argues that the plain language of the statute mandates that only other group coverage which is obtained *after* the date of the election can preclude COBRA entitlement and selection. Therefore, because Geissal's coverage under his wife's plan existed *before* he elected the COBRA continuation plan, plaintiff argues that James Geissal is entitled to continuation coverage under the Moore Plan.

In interpreting a statute, a Court is required to look to the plain language of the statute, give significance to the statute as a whole, and to examine the purpose and intent of a statute when deciding what its terms mean. *Commissioner of Internal Revenue v. Engle*, 464 U.S. 206, 217 (1984); *Richards v. United States*, 369 U.S. 1, 11 (1962); *National Labor Relations Board v. Lion Oil Co.*, 352 U.S. 282, 289-90 (1957); *United States Department of Health and Human Services v. Smith*, 807 F.2d 122, 126-27 (8th Cir. 1986).

Five Circuit Courts of Appeals have considered whether COBRA authorizes an employer to withhold continuation coverage when the departing employee has dual coverage

throughout his employment and therefore has a continuing source of coverage when he resigns or is terminated. *See Lutheran Hospital of Indiana, Inc. v. Business Men's Assurance Co. of America*, 51 F.3d 1308 (7th Cir. 1995); *McGee v. Funderberg*, 17 F.3d 1122 (8th Cir. 1994); *National Companies Health Benefit Plan v. St. Joseph's Hospital, Inc.*, 929 F.2d 1558 (11th Cir. 1991); *Brock v. Primedica, Inc.*, 904 F.2d 295 (5th Cir 1990); *Oakley v. City of Longmont*, 890 F.2d 1128 (10th Cir. 1989), *cert. denied*, 494 U.S. 1082 (1990).

The Tenth Circuit was the first circuit to address the issue in *Oakley*.[2] At the time of plaintiffs termination, he had insurance under his employer and was also a dependent under his wife's group health plan. However, his wife's plan, unlike his employer's plan, did not cover the costs of the medical treatment he needed. The court found that the plain meaning of the statute "cannot be construed to include a spouse's preexisting group plan as a condition to terminate continuation coverage." *Oakley*, 890 F.2d at 1132. The court read the language of subsection (i) to refer to other coverage occurring *after* the qualifying event. *Id.* (emphasis added).

In *Brock*, the plaintiff elected continuation coverage when she was terminated. Both before and alter her termination, she also was covered as a dependent on her husband's group health insurance plan. The Fifth Circuit held that plaintiff was not entitled to continuation coverage under COBR[illegible]. *Brock*, 904 F.2d at 297.

In *National Companies*, the plaintiff elected, upon his resignation, to continue receiving group health coverage under

2. The actual provision at issue in *Oakley* was 42 U.S.C. § 300bb-2(2)(D)(I), which covers public employees. However, it is identical to the provision at issue in this case.

his employer's plan. Both before and after his resignation, he was also covered under the group health plan of his wife's employer. Plaintiff had paid premiums and the premiums were accepted. The Eleventh Circuit held that an ERISA provider is not required to offer continuation coverage to an employee or his dependents who are covered under a preexisting group health plan. *National Companies*, 929 F.2d at 1566. The court held that

> it is immaterial when the employee acquires other group health coverage; the only relevant question is when, after the election date, does that other coverage take effect. In the case of an employee covered by preexisting group health coverage, the terminating event occurs immediately; the first time after the election date that the employee becomes covered by a group health plan other than the employer's plan is the moment after the election date. In effect, such an employee is ineligible for continuation coverage.

Id. at 1570.

In *McGee*, the plaintiff's deceased husband had health insurance as a benefit of his membership in a union. Upon his retirement, he elected continuation health coverage under COBRA and paid his monthly premiums. When he was diagnosed with cancer and began submitting claims for payment of medical expenses, the Fund terminated COBRA coverage on the basis that he was covered by another group health care plan. *McGee*, 17 F.3d at 1123. The district court adopted the rationale of the Eleventh Circuit in *National Companies*. On appeal, the Eighth Circuit found the Eleventh Circuit's reasoning "attractive," but concluded that it need not decide the question

of whether preexisting coverage defeated the employee's eligibility for continuation coverage. *Id.* at 1124.

In *Lutheran*, plaintiff was covered under both her employer's and her husband's group health plans. Plaintiff had a neurological disorder. She was then laid off. Her employer's insurance company told her she would not be eligible for COBRA coverage because of her preexisting coverage under her husband's plan. *Lutheran*, 51 F.3d at 1310 & n.1. The court held that the clear language of the statute provides that an employee loses the right to continuation coverage only if he chooses after the election date to accept coverage under another group health plan. *Id.* at 1312. Therefore, preexisting coverage would not make an employee ineligible for COBRA coverage. "The statutory distinction between preexisting and after-acquired health care coverage is reasonable and facilitates the preservation of the beneficiary's health care status quo." *Id.*

The undersigned finds the reasoning of the Eleventh Circuit persuasive and therefore holds that James Geissal's preexisting coverage under his wife's plan constitutes coverage "under any other group health plan" for purposes of 29 U.S.C. § 1162(2)(D)(i).

The fact that Geissal had other coverage is not entirely dispositive, however. According to the plain language of the statute, if the other coverage contains an "exclusion or limitation with respect to any preexisting condition of [the] beneficiary," the employee may be eligible for continuation coverage.

The question is whether there was a gap between the coverage offered by the employer and that offered by the other insurance. Circuit Courts of Appeal have examined the relative coverage available to the beneficiary under both plans.

In *Oakley*, the plaintiff sought coverage for rehabilitation therapy for a brain injury. This treatment was covered under the plan provided by his former employer but was not covered under his spouse's plan. *Oakley*, 890 F.2d at 1130. The court held that plaintiff's coverage under his spouse's plan did not render him ineligible for continuation coverage from his former employer. In dicta, the Tenth Circuit noted that there was a gap between plaintiff's coverage under his employer's plan and his coverage under his wife's plan. *Id.* at 1133. The court noted that "the facts of this case illustrate the precise gap in coverage which troubled Congress;" in other words, forcing the plaintiff's family to pay for the treatment of his catastrophic injury would put plaintiff and his family at risk and jeopardized his treatment. *Id.* at 1133.

In *Brock*, the Fifth Circuit held that preexisting coverage rendered a departing employee ineligible for continuation coverage. However, the court also noted that there was no "gap" in plaintiff's coverage under the two plans. Specifically, the court noted that plaintiff was covered under both plans for the type of medical problem for which she later claimed benefits. *Brock*, 904 F.2d at 297.

The Eleventh Circuit showed a similar concern in *National Companies* when it examined the character of plaintiff's coverage under his former employer's plan and under his spouse's preexisting plan. *National*, 929 F.2d at 1571. While the court held that an employer was not required to provide continuation coverage to an employee who was covered under a preexisting group health plan, it also held that an employee may be entitled to receive continuation coverage under his previous employer's plan, if there is a significant gap between the employer's plan and the preexisting plan. *Id.* at 1571. If

there is a significant gap in coverage such that the employee would become personally liable for substantial medical expenses to his family's detriment, the employee would not truly be "covered" under the preexisting plan. *Id.* The court noted that Congress' purpose in enacting COBRA was to respond to "the growing number of Americans without any health insurance coverage and the decreasing willingness of our Nation's hospitals to provide care to those who cannot afford to pay." *National*, 929 F.2d at 1567 (quoting H.R. Rep. No. 241, 99th Cong., 2d Sess. 44, *reprinted in* 1986 U.S.C.C.A.N. 579, 622). The court concluded that denial of continuation coverage when the employee's only other coverage does not truly cover the employee would frustrate Congress' intentions. *Id.*

In *McGee*, the Eighth Circuit noted in dicta that a significant gap between coverage afforded under the employer's plan and that afforded under the preexisting plan would entitle plaintiff to COBRA coverage. *McGee*, 17 F.3d at 1126. The court quoted *National* for the proposition that when a gap in coverage exists, then the employee is not truly covered by the preexisting group health plan. *Id.* The court found that there was a significant gap because plaintiff remained personally liable for more than $7,500 under the preexisting plan, while under her employer's plan she would have been personally liable for only $1,000 in medical expenses. *Id.*

In this case, plaintiff maintains that there is a significant gap between the coverage provided by Moore and that provided by the preexisting plan because (1) Moore's plan had an annual deductible of $150 for covered medical services and treatments that Geissal needed, while Aetna's plan had an annual deductible of $500 per year per person; (2) Moore's plan had a lifetime maximum only as to payments made by the Plan and Aetna's

plan had a lifetime maximum as to payments made by Aetna; therefore, before his termination Geissal had the benefit of two maximums; (3) coverage of some kinds of care were different, with coverage under Moore's plan being more extensive. (Affidavit of James Geissal, filed June 5, 1995, at ¶¶ 5-7.)

Plaintiff does not allege that James Geissal suffered from a preexisting condition that was not covered under Aetna's plan. Plaintiff does not allege that Geissal's condition was not covered by Aetna. Although the record is unclear about the exact amount of benefits paid or the extent of coverage, there is no dispute that benefits were in fact paid. The only difference between the two policies that Geissal asserted in his affidavit is the amount of deductible. This is not a significant gap. *See National*, 929 F.2d at 1571. A significant gap in coverage exists when coverage is excluded or limited for certain types of conditions or treatments. *See, e.g., Brock v. Primedica, Inc.*, 904 F.2d 295, 297 (5th Cir. 1990). Plaintiff has provided no evidence that coverage under the TWA plan was excluded or limited for Geissal's condition.

Plaintiff argues that, even if Moore was not required to provide continuation coverage to James Geissal, it is estopped from denying such coverage. *See National*, 929 F.2d at 1571-74. Plaintiff alleges a federal common law claim of estoppel in Count II.[3]

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3. The Eighth Circuit has not recognized a federal common law action for equitable estoppel, although it has been suggested that it would do so in certain circumstances. *Slice v. Sons of Norway*, 34 F.3d 630, 633-34 (8th Cir. 1994); *Coonce v. Aetna Life Insurance Co.*, 777 F. Supp. 759, 769-70 (W. D. Mo. 1991). *See also McGee*, 17 F.3d at 1126.

The elements of equitable estoppel, as defined by federal common law, are that (1) the party to be estopped misrepresented material facts; (2) the party to be estopped was aware of the true facts; (3) the party to be estopped intended that the misrepresentation be acted on or had reason to believe the party asserting the estoppel would rely on it; (4) the party asserting estoppel did not know, nor should it have known, the true facts; and (5) the party asserting the estoppel reasonably and detrimentally relied on the misrepresentation. *Heckler v. Community Health Services, Inc.*, 467 U.S. 51, 59 (1984); *National*, 929 F 2d at 1572; *United States v Aetna Casualty & Surety Co.*, 480 F.2d 1095, 1099 (8th Cir. 1973).

Plaintiff argues that Geissal was offered continuation coverage, (Aff. at ¶¶ 10b, 12) and that he relied upon that offer to his detriment. (Aff. at 10, 11). He stated that he did not look for other insurance, knowing how weak TWA was financially and how he needed more than what TWA provided, and he did not pursue investigation as to defendants' possible misconduct in terminating him.

In *National*, the court found that the employer had misrepresented to plaintiff that he was entitled to and would receive continuation coverage, in a memorandum explaining continuation coverage; that by accepting premium payments for four months, the company continually assured plaintiff that the Plan was providing him with coverage; that Plan representatives knew or believed, prior to plaintiff's resignation, that plaintiff was ineligible for continuation coverage because of his preexisting coverage; that plaintiff relied on the company's memorandum notifying him of his rights with respect to continuation coverage; that plaintiff was unaware of the true facts because there was no evidence that plaintiff knew he was

not entitled to continuation coverage; and that plaintiff relied on those representations by deciding not to accept coverage under another policy when he learned he would be entitled to continuation coverage. In addition, plaintiff incurred personal liability for $6,700 in medical expenses he would not have incurred had he maintained dual coverage. *National*, 929 F.2d at 1573-74.

In *McGee*, McGee elected, upon retirement, to continue coverage and he paid monthly premiums. When he was diagnosed with cancer and began to submit claims for payment of medical expenses, his employer's plan terminated COBRA coverage. *Id.* at 1123. McGee continued to tender premium payments until he died, but the Fund refused to accept the payments. *Id.* The Eighth Circuit indicated in dicta that the doctrine of equitable estoppel might be applicable to such a case, in which the employers plan accepted the employee's premiums for months, denied coverage when he became sick, and he relied to his detriment on the Fund's representations that COBRA coverage would be afforded. *McGee*, 17 F.3d at 1126.

In this case, there is no dispute that defendants told Geissal he was entitled to continuation coverage. In addition, defendants accepted Geissal's premium payments for about six months, from the date of termination, July 16, 1993, until he was notified on January 27, 1994, that Moore had determined he was not entitled to COBRA coverage. There is no evidence that Plan Representatives previously knew he was covered by a preexisting policy. However, the Court will assume that the defendants had constructive knowledge because of their obligation to know every ERISA provision and to determine employees' rights. *National*, 929 F.2d at 1573 n.15. There is no dispute that Geissal

relied on the company's notification that he was entitled to continuation coverage. There also is no dispute that Geissal was unaware of the true facts, *e.g.*:, that the preexisting policy disqualified him from COBRA coverage.

However, while plaintiff asserts that Geissal relied on those representations, there is no evidence that he relied on them to his detriment. Plaintiff has not shown that Geissal suffered any economic loss. *See National*, 929 F.2d at 1574 n.16. Geissal stated that, although he gave some thought to whether he should consult an attorney to investigate what rights and claims he may have had against Moore concerning his termination and he knew that he could complain to government agencies about his termination, he decided not to do so because his main concern was that he have full and adequate health insurance. (Geissal Aff. at ¶¶ 10 and 10a.) He further stated that Moore representatives encouraged him to make the COBRA election offered by Moore, and that conduct did much to assuage his feelings about his discharge, so much so that he decided against taking any investigative steps beyond requesting a service letter. (Geissal Aff. at ¶ 10b.) Geissal stated that he later learned that, by the time Moore informed him that he was not entitled to COBRA coverage, his termination-related claims were time-barred. (Geissal Aff. at ¶ 16.)

Geissal's statements are insufficient to show detrimental reliance. There is no evidence that Geissal accepted the COBRA coverage as part of an express agreement not to take legal action against Moore concerning his termination. Geissal's statements of inchoate claims are speculative and insufficient to withstand summary judgment. Fed. R. Civ. P. 56(e).

Geissal also states that, had he known he would be limited to coverage only through his wife's policy, he would have

looked for additional coverage. (Geissal Aff. at ¶ 11.) This statement is speculative at best concerning the outcome of any such search for other coverage, and the statement is insufficient to withstand summary judgment. *Smith v. Hartford Insurance Group*, 6 F.3d 131, 137 (3d Cir. 1993); Fed. R. Civ. P. 56(e). This is not a case where Geissal found other insurance coverage but decided not to purchase it because of Moore's representation about COBRA continuation coverage. *See National*, 929 F.2d at 1574.

For these reasons, the plaintiff's motion for partial summary judgment will be denied. The material facts are undisputed and defendants are entitled to judgment on Counts I and II as a matter of law. Therefore, judgment will be entered in favor of the defendants on Counts I and II. *Madewell v. Downs*, 68 F.3d 1030, 1048-50 (8th Cir. 1995).

Count III alleges that the defendants, by accepting Geissal's payments, waived any differing construction or interpretation of plan documents. Plaintiff did not move for summary judgment on that ground and the parties have not argued it. The doctrines of waiver and estoppel are distinct. *Karlen v. Ray E. Friedman & Co. Commodities*, 688 F.2d 1193, 1197 (8th Cir. 1982). *See Buder v. Fiske*, 174 F.2d 260, 267-68, *reh'g denied*, 177 F.2d 907 (8th Cir. 1949). Plaintiff also did not seek summary judgment on Count IV.

An appropriate order is issued herewith.

s/ David D. Noce
UNITED STATES MAGISTRATE JUDGE

Signed this 19th day of March, 1996.

APPENDIX G — ORDER FOR ENTRY OF FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION FILED APRIL 4, 1996

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:94 CV 1263 DDN

BONNIE L. GEISSAL as representative of the Estate of JAMES W. GEISSAL, deceased, etc.

Plaintiff,

v.

MOORE MEDICAL CORP., et al

Defendants,

ORDER FOR ENTRY OF FINAL JUDGMENT COUNTS I AND II

On application of plaintiff and without objection of defendants, the Court hereby determines and finds that by reason of the rationale expressed in the Court's memorandum of March 19, 1996 entered in this matter, entering summary judgment in favor of defendants on the Court's own motion on Counts I and II, the Court hereby expressly determines there is no just reason for delay of entry of final judgment in favor of defendants on Counts I and II. The Court hereby directs the

Appendix G

Clerk to enter final judgment in favor of defendants on Counts I and II. In the event plaintiff timely appeals from the entry of such judgments, further action on Counts III and IV shall be stayed until disposition of the appeal.

s/ David D. Noce
United States Magistrate Judge

Dated at St. Louis MO
April 4, 1996

APPENDIX H — ENTRY OF JUDGMENT BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI FILED APRIL 16, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 4:94 CV 1263 DDN

BONNIE L. GEISSAL as representative of the Estate of JAMES

Plaintiff(s),

v.

MOORE MEDICAL CORP., et al.

Defendant(s)

* * *

☒ **Decision by Court.** This action came before the Court on motion for summary judgment and entry of final judgment. Motions having been decided, and at the direction of the Court, judgment is entered accordingly;

IT IS HEREBY ORDERED AND ADJUDGED that final judgment is entered in favor of defendants Moore Medical Corporation, Herbert Walker and Group Benefit Plan, and against plaintiff Bonnie Geissal on Counts I and II of plaintiff's complaint.

Appendix H

Robert D. St. Vrain
CLERK

By: s/ Gilbert N. Beckemeier, III

Gilbert N. Beckemeier, III
Deputy Clerk

April 16, 1996
DATE

APPENDIX I — RELEVANT ACTS

CONSOLIDATED OMNIBUS BUDGET RECONCILIATION ACT OF 1986, Pub. L. No. 99-272, Sec. 10002, 100 Stat. 228, April 7, 1986 (codified as amended at 29 U.S.C. § 1162 (2) (D) (i) (1997)).

SEC. 602 CONTINUATION COVERAGE.

For purposes of section 601, the term 'continuation coverage' means coverage under the plan which meets the following requirements:

(1) TYPE OF BENEFIT COVERAGE. * * *

(2) PERIOD OF COVERAGE. The coverage must extend for at least the period beginning on the date of the qualifying event and ending not earlier than the earliest of the following:

(A) MAXIMUM PERIOD. * * *

(B) END OF PLAN. * * *

(C) FAILURE TO PAY PREMIUM. * * *

(D) REEMPLOYMENT OR MEDICARE ELIGIBILITY.

The date on which the qualified beneficiary first becomes, after the date of the election —

(i) a covered employee under any other group health plan, or

Appendix 1

TAX REFORM ACT OF 1986, Pub. L. No. 99-514, Sec. 1895, 100 Stat. 2938, October 22, 1986 (codified as amended at 29 U.S.C. § 1162 (2) (D) (i) (1997)).

SEC. 602 CONTINUATION COVERAGE.

* * *

(2) PERIOD OF COVERAGE. * * *

(D) GROUP HEALTH PLAN COVERAGE OR MEDICARE ELIGIBILITY. The date on which the qualified beneficiary first becomes, after the date of the election —

(i) covered under any other group health plan

(as an employee or otherwise), or

Appendix 1

CONSOLIDATED BUDGET RECONCILIATION ACT OF 1986, Pub. L. No. 101-239, Sec. 7862, 103 Stat. 2432, Dec. 19, 1989 (codified as amended at 29 U.S.C. § 1162 (2) (D) (i) (1997)).

SEC. 602 CONTINUATION COVERAGE.

* * *

(2) PERIOD OF COVERAGE. * * *

(D) GROUP HEALTH PLAN COVERAGE OR MEDICARE ENTITLEMENT. The date on which the qualified beneficiary first becomes, after the date of the election —

(i) covered under any other group health plan, (as an employee or otherwise) which does not contain any exclusion or limitation with respect to any preexisting condition of such beneficiary, or

Appendix 1

THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996, Pub. L. 104191, Sec. 421, 110 Stat. 2088, Aug. 21, 1996 (codified as amended at 29 U.S.C. 1162 (2) (D) (i) 1997))

§ 1162 CONTINUATION COVERAGE.

* * *

(2) PERIOD OF COVERAGE. * * *

(D) GROUP HEALTH PLAN COVERAGE OR MEDICARE ENTITLEMENT. The date on which the qualified beneficiary first becomes, after the date of the election —

(i) covered under any other group health plan (as an employee or otherwise) which does not contain any exclusion or limitation with respect to any preexisting condition of such beneficiary (other than such an exclusion or limitation which does not apply to (or is satisfied by) such beneficiary by reason of chapter 100 of the Internal Revenue Code of 19867 part 7 of this subtitle, or title XXVII of the Public Health Service Act), or